IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-601

THE FOUKE COMPANY,
Petitioner,

v.

ANIMAL WELFARE INSTITUTE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court, *Animal Welfare Institute* v. *Richardson*, Civil Action No. 76-0483 (D.D.C. 1976), has not been reported; it is reproduced in the Appendix accompanying the Petition for a Writ of Certiorari (pages 63a-66a). The opinion of the Court of Appeals, *Animal Welfare Institute* v. *Kreps*, No. 76-2148 (D.C. Cir. 1977), has not yet been reported; it is reproduced in the Appendix accompanying the Petition for a Writ of Certiorari (pages 67a-92a).

JURISDICTION

The judgment of the Court of Appeals was entered on July 27, 1977. The Petition for a Writ of Certiorari was filed on October 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that animal protection and conservation organizations have standing to challenge a waiver by the Secretary of Commerce of the statutory moratorium on importation of marine mammal products when (a) those organizations have alleged that the action of the Secretary of Commerce causes injury to the recreational, aesthetic, scientific, and educational interests of the organizations' members, and (b) the statute explicitly provides that judicial review may be obtained by any party opposed to issuance of an import permit following waiver of the moratorium by the Secretary.

2. Whether the Court of Appeals was correct in holding that the statutory prohibition on importation in the case of marine mammals "nursing at the time of taking, or less than eight months old," was contravened by a decision of the Secretary of Commerce permitting importation of baby fur seal skins when (a) the foreign seal-killing season began on a date when 50% of the seals were less than eight months old, and (b) the seals were in fact nursing at the time of taking but the nursing was considered by the Secretary not to be "obligatory for the physical health and survival of the nursing animal."

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Marine Mammal Protection Act of 1972 ("MMPA") and Department of Commerce regulations are set forth in the Appendix to this brief (pages 1a-15a).

STATEMENT

The MMPA established a new national policy on marine mammals and their products. A principal operative provision of the Act is a moratorium on the taking or importation of marine mammals and marine mammal products. Section 101(a). The Secretary of Commerce is empowered to waive the moratorium "on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission"; each waiver must be accompanied by the Secretary's certification "that the program for taking marine mammals in the country of origin is consistent with the provisions and policies" of the Act. Section 101(a)(3)(A). Regulations to implement a waiver "must be made on the record after opportunity for an agency hearing on both the Secretary's determination to waive the moratorium pursuant to Section 101(a)(3)(A) of this title and on such regulations, . . ." Section 103(d). Even if the moratorium is waived as to a particular category of marine mammal, the statute prohibits importation of any such mammal, or products therefrom, if the mammal was "nursing at the time of taking, or less than eight months old".[1] Section 102(b)-(c). Judicial review of the terms and conditions of any import permit granted pursuant to waiver of the moratorium is explicitly provided for "any party opposed" to the permit. Section 104(d)(6).

In 1975, Petitioner The Fouke Company applied to the Department of Commerce for a waiver of the moratorium so that it could import baby fur seal skins from

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[1] An exception to the prohibition, not here relevant, is for importation "pursuant to a permit for scientific research issued under section 104(c) of this title, ..."

South Africa. Respondent animal protection and conservation organizations participated in the administrative proceedings, opposing a waiver. In February 1976, the Department decided to grant a waiver and promulgated implementing regulations. The regulations specified that skins to be imported must be from seals that at the time of taking were not nursing or less than eight months old, but the regulations incorporated the following definitions:

> "(2) 'Eight months old means eight months old as determined by using a mean birthdate for the Cape fur seal of December 1 for any one pupping season.
>
> * * * *
>
> "(4) 'Nursing' means nursing which is obligatory for the physical health and survival of the nursing animal."

The record of the administrative proceedings showed without dispute that 50% of the seals in a pupping season are born after December 1, and that the seals do not stop nursing until October or November, three or more months after the South African seal harvest has begun.

On March 24, 1976, Respondents filed suit in the District Court, alleging that the Department of Commerce waiver and regulations contravened the MMPA for the following reasons, among others: (1) skins from seals that were less than eight months old at the time of taking would be permitted to be imported; (2) skins from seals that were nursing at the time of taking would be permitted to be imported; and (c) South Africa's program for taking marine mammals could not be certified to be consistent with the provisions and policies of the MMPA. Respondents asserted in paragraph 10 of their complaint:

> "The Plaintiff organizations bring this action on behalf of themselves and their members, each of

> whom has a personal stake in the maintenance of a safe, healthful and productive environment and in the protection of marine mammals. The decision of the Defendants described herein will contribute to the death and injury of marine mammals and injury to the ecosystem of the South Atlantic Ocean. The Defendants' decision will cause the members of the Plaintiff organizations injury and will adversely affect them in one or more of their activities or recreational pursuits. The decision impairs the interests of the Plaintiff organizations and their members in observing and studying marine mammals including the Cape fur seal. Through sanctioning the seal harvesting methods of the South African Government, the Defendants' decision impairs the ability of members of the Plaintiff organizations to see, photograph, and enjoy Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to excessive harvesting, inhumane treatment and slaughter of pups that are very young and still nursing. The Defendants' decision impairs the efforts of the Plaintiff organizations and their members to assure the carrying out of sound conservation practices with respect to the Cape fur seal, in accordance with the MMPA. The decision impairs their efforts to assure humane treatment of marine mammals in conformity with the Act. The MMPA was enacted in response to public outcry against the commercial exploitation of very young and still nursing marine mammals, particularly seals. The Defendants' decision impairs the interests of the Plaintiff organizations and their members in seeing to it that the provisions of the MMPA are given full effect in accordance with the mandate of Congress."

Respondents moved in the District Court for a preliminary injunction. The Fouke Company moved to intervene as a party defendant, and its motion was granted.

The District Court dismissed the complaint on December 23, 1976. While acknowledging that Respondents "have an interest within the zone of interests to be protected" by the MMPA, the District Court held that Respondents lacked standing to sue because "Plaintiffs' assertion of interference with an interest in studying the Cape fur seal is speculative at best," and "There is nothing on this record to show that Plaintiffs, however great their interests are, are on any different footing from any other concerned citizen." Respondents appealed.

The Court of Appeals denied Respondents' motion for an injunction against importation pending appeal, but agreed to expedite the appeal and recorded a stipulation that the appeal briefs would address the validity of the Department of Commerce decision as well as the issue of standing. A unanimous panel reversed the decision of the District Court on standing. On the merits, the Court of Appeals held that (1) the Department of Commerce waiver decision contravened the MMPA in permitting importation of skins from seals that were killed when they were less than eight months old and/or nursing; and (2) the certification that South Africa's sealing program is consistent with the provisions and policies of the statute was invalid.

The Fouke Company, intervenor in the District Court, has now petitioned for a writ of certiorari. The Defendants—the Secretary of Commerce and the Director of the National Marine Fisheries Service—have not sought review in this Court.

ARGUMENT

I. The Holding of the Court of Appeals That the Respondents Have Standing to Sue Is in Accord with the Decisions of This Court.

Respondents satisfy the three basic prerequisites for standing established by this Court—injury in fact, a causal connection between the Defendants' action and Respondents' injury, and an interest within the zone of interests sought to be protected by the MMPA. In addition, Respondents have standing because the MMPA created new rights for them and has provided judicial review to secure those rights.

A. *Respondents Have Standing by Virtue of Rights Created by Statute.*

Petitioner argues (Petition, pages 12-13) that the Court of Appeals held Respondents to have standing by virtue of the MMPA and without regard to the requirements of Article III of the Constitution. It is plain that the Court of Appeals did not so hold. Its opinion stated:

> "For, while Congress cannot of course authorize exercise of judicial power in the absence of a case or controversy, the Supreme Court has held that the injury required by Article III may exist solely by virtue of a statute: 'Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.' [12]

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[12] *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973). *Accord, Warth* v. *Seldin*, 422 U.S. 490, 500 (1975); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)."

Congress, in the MMPA, set up a new regime of law for the protection of marine mammals. With stated exceptions, it imposed a moratorium on the killing or importing of marine mammals and products derived from

them. Implementation was entrusted to the Secretary of Commerce, and provision was made for public participation in the process of enforcing the statute. Respondents were among the organizations that sought passage of the Act; they testified at hearings on the legislation and at subsequent oversight hearings on administration of the Act. The MMPA requires a public hearing on the record prior to waiver of the statutory moratorium and prior to the promulgation of implementing regulations. Section 103(d). The Act provides for judicial review of the terms and conditions of an import permit issued under a waiver, at the suit of "any party opposed" to the permit. Section 104(d)(6). Congress clearly contemplated that organizations such as Respondents would continue to be concerned with marine mammal protection, would participate in administrative proceedings under the MMPA, and would institute appropriate litigation to challenge actions of the Secretary of Commerce not in conformity with the Act.

Respondents in this case participated actively at every stage of the administrative proceedings for waiver of the statutory moratorium with respect to the Cape fur seal. Since Congress gave organizations such as Respondent a role in enforcement of the MMPA, a moratorium waiver decision failing to accord to marine mammals the protection provided by the Act constitutes injury to the interests of Respondents. The Court of Appeals held that the statutory scheme gives Respondents a right of judicial review with respect to the waiver regulations[2] and that Respondents have standing to sue.

[2] *See* Opinion of the Court of Appeals, Petitioner's Appendix, pages 72a-74a, for discussion of the statutory right of judicial review. Petitioner does not contest the proposition that the statutory scheme was designed to afford Respondents a right of judicial review of waiver *regulations* as well as of *permits* issued under the regulations. Petitioner's contention instead is that Constitutional standing requirements bar Respondents' suit. Petition, pages 12-13.

That holding follows directly from the analysis and rationale set forth in cases decided by this Court. In *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975), for example, the Court stated in regard to standing requirements:

> "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .'"

In an earlier case, *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973), the Court stated:

> "Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that at least in the absence of a statute expressly conferring standing,[3] federal plaintiff's must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.

[3] It is, of course, true that 'Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions.' But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." [Citations omitted.]

In the case of the MMPA, Congress has enacted a statute creating legal rights, and invasion of them results in injury that gives rise to standing.

There is a close parallel here with *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). In that case, two tenants of an apartment complex filed a complaint with the Department of Housing and Urban Development, as provided by statute, alleging illegal racial discrimination by the apartment owner against non-white rental applicants. After failing to secure an administrative remedy, these tenants commenced an action in the federal district court. The applicable statute provided for suit by a "person aggrieved". This Court held unanimously that the tenants had standing to sue even though neither of them had been discriminated

against by the defendant. The concurring opinion of Mr. Justice White stated:

> "Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution. But with that statute purporting to give all those who are authorized to complain to the agency the right also to sue in court, I would sustain the statute insofar as it extends standing to those in the position of the petitioners in this case." 409 U.S. 212.

The District Court in the present case considered Respondents to be on no "different footing from any other concerned citizen." Opinion of the District Court, Petitioner's Appendix, page 65a. If the injury to Respondents from Defendants' contravention of the MMPA was an injury shared by many persons, the prudential limitation against permitting litigation of a "generalized grievance" was overcome by the statutory authorization of judicial review for Respondents. *See Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), where this Court stated:

> "Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."

B. *Respondents Have Standing Apart from the MMPA Provisions on Administrative and Judicial Review.*

The Court of Appeals based its decision alternatively on an analysis finding that Respondents had alleged injury in fact, a causal connection between Defendants' action and Respondents' injury, and interests within the zone of interests to be protected by the MMPA.

None of the arguments raised by Petitioner to the contrary has merit.

With respect to injury, Respondents alleged harm to the recreational, aesthetic, scientific, and educational interests of their members. It is settled law that harm to such interests is sufficient. *United States* v. *SCRAP*, 412 U.S. 669, 686 (1973); *see Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972).

Petitioner attacks Respondents' standing because of the small number of Respondents' members who have traveled or can now say they plan to travel to South Africa to observe the Cape fur seal.[3] Petition, pages 13-14. But this Court has made clear that size and number in relation to a plaintiff's injury do not determine standing. *See Warth* v. *Seldin*, *supra*, at 511; *United States* v. *SCRAP*, *supra*, at 689, note 14.

Petitioner argues also that Respondents lack standing because no causal relationship has been shown between the Defendants' actions and the Respondents' injury, on the ground that it is South Africa and not the Defendants that conduct harvesting of the Cape fur seal. Petition, pages 15-19. This argument, likewise, is without basis. First, the administrative record showed that South Africa and its seal harvesting program have been affected by United States decisions under the MMPA.[4] *See* Opinion

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[3] Petitioner also contends that the fact that Respondents' members traveled to South Africa to monitor seal harvesting negates their interest, injury, and standing. Petition, pages 14-15. Such monitoring is plainly an aspect of observation and study in connection with scientific and educational interests.

[4] Petitioner attempts to counter this with the following statement: "The record supports the administrative finding that more restrictive waiver conditions would bring about no substantial changes in South Africa's sealing practices and might well be counterproductive." Petition, page 17. The portion of the administrative record cited by Petitioner in fact states: "The concept presented

of the Court of Appeals, Petitioner's Appendix, pages 80a-81a. Second, Congress has determined as a matter of law in the MMPA that a prohibition on importation is an appropriate and effective method for protecting the marine mammals of the globe from foreign killings that do not meet the standards of the Act.

Neither the District Court nor Petitioner has questioned that Respondents satisfy the zone-of-interests requirement.

II. The Court of Appeals Was Correct in Holding That the Moratorium Waiver in the Present Case Contravenes the MMPA.

The Court of Appeals decision, on the merits, that the Defendants' waiver of the moratorium contravened the MMPA follows from the requirements of the statute itself. The Act prohibits the importation of products from marine mammals that were nursing, or less than eight months old, at the time of taking. The Defendants' waiver would permit importation of skins from seals that were in fact nursing when taken, and from a harvest in South Africa that began when 50% of the year's baby seals that were the target of the harvest were less than eight months old. The Court of Appeals has not interpreted the Act to require that every seal taken be shown to be eight months old or older. It has simply held that the Defendants' waiver formula departs so far from the statutory standard on age that it cannot be sustained. *See* Opinion of the Court of Appeals, Petitioner's Appendix, pages 84a-85a, including note 52.

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by Protestants of an absolute proscription based on a requirement that *all* be over 8 months of age appears restrictive beyond the scope of reasonableness. Such would place extreme pressures on sealing operations in South Africa and could well, in the long run, be counter-productive." Initial Decision of Administrative Law Judge, Petitioner's Appendix, page 22a.

Petitioner seeks to sustain the Defendants' definition of "nursing" as nursing that is "obligatory for the physical health and survival of the nursing animal" on the ground that it constitutes informed judgment by a federal agency based on expert knowledge. Petition, pages 25-26. In fact, adoption of the definition followed efforts by the Fouke Company to secure an interpretation that would allow it to import South African seal skins under the MMPA. *See* Petition, pages 24-25; Opinion of the Court of Appeals, Petitioner's Appendix, pages 87a-88a; Respondents' brief in the Court of Appeals, pages 27-31 (reproduced in the Appendix to this brief, pages 15a-20a). The Defendants, in adopting the definition, did not seek to justify it as being based on scientific analysis. *See* 40 *Fed. Reg.* 4660 (January 31, 1975); 40 *Fed. Reg.* 17845 (April 23, 1975). The Marine Mammal Commission, an expert body established by the Marine Mammal Protection Act to advise the Secretary of Commerce, characterized the distinction between "obligatory" and "convenience" nursing as an "empty one" with "no rational scientific basis." *See* 40 *Fed. Reg.* 17846 (April 23, 1975). The definition of "nursing" adopted by the Defendants and relied on by them in waiving the statutory moratorium does not accord with section 102(b)-(c) of the MMPA and was accordingly ruled invalid by the Court of Appeals.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

MARINE MAMMAL PROTECTION ACT PROVISIONS

FINDINGS AND DECLARATION OF POLICY

SEC. 2. The Congress finds that—

(1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions;

(3) there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully;

(4) negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals;

(5) marine mammals and marine mammal products either—

(A) move in interstate commerce, or

(B) affect the balance of marine ecosystems in a manner which is important to other animals

and animal products which move in interstate commerce,

and that the protection and conservation of marine mammals is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and

(6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the optimum carrying capacity of the habitat.

TITLE I—CONSERVATION AND PROTECTION OF MARINE MAMMALS

MORATORIUM AND EXCEPTIONS

SEC. 101. (a) There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this Act, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

(3)(A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to

the distribution, abundance, breeding habits, and time and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this Act to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with section 102, 103, 104, and 111 of this title permitting and governing such taking and importing, in accordance with such determinations: *Provided, however,* That the Secretary, in making such determinations, must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this Act: *Provided further, however,* That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this Act. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.

PROHIBITIONS

SEC. 102.

* * * *

(b) Except pursuant to a permit for scientific research issued under section 104(c) of this title, it is unlawful to import into the United States any marine mammal if such mammal was—

(1) pregnant at the time of taking;

(2) nursing at the time of taking, or less than eight months old, whichever occurs later;

(3) taken from a species or population stock which the Secretary has, by regulation published in the Federal Register, designated as a depleted species or stock or which has been listed as endangered under the Endangered Species Conservation Act of 1969; or

(4) taken in a manner deemed inhumane by the Secretary.

(c) It is unlawful to import into the United States any of the following:

(1) Any marine mammal which was—

(A) taken in violation of this title; or

(B) taken in another country in violation of the law of that country.

(2) Any marine mammal product if—

(A) the importation into the United States of the marine mammal from which such product is made is unlawful under paragraph (1) of this subsection; or

(B) the sale in commerce of such product in the country of origin of the product is illegal;

(3) Any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish.

REGULATIONS ON TAKING OF MARINE MAMMALS

SEC. 103. (a) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 2 of this Act.

(b) In prescribing such regulations, the Secretary shall give full consideration to all factors which may affect the extent to which such animals may be taken or imported including, but not limited to the effect of such regulations on—

(1) existing and future levels of marine mammal species and population stocks;

(2) existing international treaty and agreement obligations of the United States;

(3) the marine ecosystem and related environmental considerations;

(4) the conservation, development, and utilization of fishery resources; and

(5) the economic and technological feasibiltiy of implementation.

(c) The regulations prescribed under subsection (a) of this section for any species or population stock of marine mammal may include, but are not limited to, restrictions with respect to—

(1) the number of animals which may be taken or imported in any calendar year pursuant to permits issued under section 104 of this title;

(2) the age, size, or sex (or any combination of the foregoing) of animals which may be taken or imported, whether or not a quota prescribed under paragraph (1) of this subsection applies with respect to such animals;

(3) the season or other period of time within which animals may be taken or imported;

(4) the manner and locations in which animals may be taken or imported; and

(5) fishing techniques which have been found to cause undue fatalities to any species of marine mammal in a fishery.

(d) Regulations prescribed to carry out this section with respect to any species or stock of marine mammals must be made on the record after opportunity for an agency hearing on both the Secretary's determination to waive the moratorium pursuant to section 101(a)(3)(A) of this title and on such regulations, except that, in addition to any other requirements imposed by law with respect to agency rulemaking, the Secretary shall publish and make available to the public either before or concurrent with the publication of notice in the Federal Register of his intention to prescribe regulations under this section—

(1) a statement of the estimated existing levels of the species and population stocks of the marine mammal concerned;

(2) a statement of the expected impact of the proposed regulations on the optimum sustainable population of such species or population stock;

(3) a statement describing the evidence before the Secretary upon which he proposes to base such regulations; and

(4) any studies made by or for the Secretary or any recommendations made by or for the Secretary or the Marine Mammal Commission which relate to the establishment of such regulations.

(e) Any regulation prescribed pursuant to this section shall be periodically reviewed, and may be modified from time to time in such manner as the Secretary deems consistent with and necessary to carry out the purposes of this Act.

(f) Within six months after the effective date of this Act and every twelve months thereafter, the Secretary shall report to the public through publication in the Federal Register and to the Congress on the current status of all marine mammal species and population stocks subject to the provisions of this Act. His report shall describe those actions taken and those measures believed necessary, including where appropriate, the issuance of permits pursuant to this title to assure the well-being of such marine mammals.

PERMITS

SEC. 104. (a) The Secretary may issue permits which authorize the taking or importation of any marine mammal.

(b) Any permit issued under this section shall—

(1) be consistent with any applicable regulation established by the Secretary under section 103 of this title, and

(2) specify—

(A) the number and kind of animals which are authorized to be taken or imported,

(B) the location and manner (which must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported,

(C) the period during which the permit is valid, and

(D) any other terms or conditions which the Secretary deems appropriate.

In any case in which an application for a permit cites as a reason for the proposed taking the overpopulation of a particular species or population stock, the Secretary shall first consider whether or not it would be more desirable to transplant a number of animals (but not to exceed the number requested for taking in the application) of that species or stock to a location not then inhabited by such species or stock but previously inhabited by such species or stock.

(c) Any permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of display or scientific research shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation. Any person authorized to take or import a marine mammal for purposes of display or scientific research shall furnish the Secretary a report on all activities carried out by him pursuant to that authority.

(d)(1) The Secretary shall prescribe such procedures as are necessary to carry out this section, including the form and manner in which application for permits may be made.

(2) The Secretary shall publish notice in the Federal Register of each application made for a permit under this section. Such notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data or views, with respect to the taking or importation proposed in such application.

(3) The applicant for any permit under this section must demonstrate to the Secretary that the taking or importation of any marine mammal under such permit will be consistent with the purposes of this Act and the applicable regulations established under section 103 of this title.

(4) If within thirty days after the date of publication of notice pursuant to paragraph (2) of this subsection with respect to any application for a permit any interested party or parties request a hearing in connection therewith, the Secretary may, within sixty days following such date of publication, afford to such party or parties an opportunity for such a hearing.

(5) As soon as practicable (but not later than thirty days) after the close of the hearing or, if no hearing is held, after the last day on which data, or views, may be submitted pursuant to paragraph (2) of this subsection, the Secretary shall (A) issue a permit containing such terms and conditions as he deems appropriate, or (B) shall deny issuance of a permit. Notice of the decision of the Secretary to issue or to deny any permit under this paragraph must be published in the Federal Register within ten days after the date of issuance or denial.

(6) Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit. Such review, which shall be pursuant to chapter 7 of title 5, United States Code, may be initiated by

filing a petition for review in the United States district court for the district wherein the applicant for a permit resides, or has his principal place of business, or in the United States District Court for the District of Columbia, within sixty days after the date on which such permit is issued or denied.

DEPARTMENT OF COMMERCE REGULATIONS

§ 216.32 Waiver of the moratorium.

(a) *Waiver.* The moratorium on importation is waived to permit the importation of up to 19,180 skins of Cape fur seals (*Arctocephalus pusillus pusillus*) harvested within the Republic of South Africa and harvested by or under the auspices of the Republic of South Africa and under the following conditions:

(1) No more than 70,000 Cape fur seals are harvested in any one annual harvest conducted by or under the auspices of the Republic of South Africa commencing with the 1975 harvest. This level of harvest will be adjusted to reflect the results of an annual review conducted pursuant to paragraph (5) of this subsection which may indicate that a different harvest level is appropriate to allow the population to remain within the range of optimum sustainable population, in which case the aforementioned figures of 70,000 seals and 19,180 seal skins will be adjusted accordingly, commencing with the 1976 harvest.

(2) The upper limit to the number of skins which may be imported is predicated upon the percent of the total harvest which recently has occurred in South Africa. The results of an annual review conducted pursuant to paragraph (5) of this subsection may suggest a change in this percentage, due to a change in harvesting practices, in which case the upper limit will be adjusted accordingly; provided, however, that such a shift in harvesting practices is consistent with the purposes and policies set forth in the Act.

(3) The skins were taken from Cape fur seals which at the time of taking were not:

(i) nursing;

(ii) pregnant; or

(iii) less than eight months old.

(4) The skins are from Cape fur seals taken in a manner not deemed inhumane by the Director.

(5) Skins from Cape fur seals harvested subsequent to 1975 may be imported, provided the Director upon annual review determines that conditions so warrant continuation of the waiver. This review will include, among other things, an assessment of whether efforts have been made, in good faith, to:

(i) develop a program which will provide additional information regarding age, sex, mortality rate, and fecundity rate of Cape fur seals;

(ii) expand the program of tagging, aerial photographs and other methods of collecting data, in order to provide an accurate and systematic monitoring of the Cape fur seal population;

(iii) develop a program which will provide additional information on the interrelationship of the Cape fur seal and its ecosystem; and

(iv) expand upon programs to insure the continuation of acceptable standards of humane taking.

(b) *Purpose.* The Director waived the moratorium on importation in order to allow the importation of up to 19,180 skins from Cape fur seals (*Arctocephalus pusillus pusillus*), harvested by or harvested under the auspices of the Republic of South Africa, within the Republic

of South Africa (excluding Namibia) subject to certain conditions and limitations. The purpose of these regulations is to establish the criteria, conditions and procedures for importing these skins.

(c) *Scope.* This section applies to the importation of skins from Cape fur seals which are subject to the waiver by the Director.

(d) *Definitions.* In addition to the definitions contained in the Act, these regulations, and unless the context otherwise requires, in this section:

(1) "Cape fur seals" means fur seals scientifically designated as *Arctocephalus pusillus pusillus.*

(2) "Eight months old" means eight months old as determined by using a mean birthdate for the Cape fur seal of December 1 for any one pupping season.

(3) "Namibia" means that territory formerly known as South West Africa.

(4) "Nursing" means nursing which is obligatory for the physical health and survival of the nursing animal.

(e) *Prohibitions.* It is unlawful to import skins from Cape fur seals except under the following circumstances:

(1) For skins imported for processing or finished skins not previously imported for processing:

(i) Such importation is pursuant to a permit issued by the Director in accordance with these regulations;

(ii) Any skins imported are accompanied by a Certification by the Minister of Fisheries, Republic of South Africa, in such form as the Director shall approve, to the effect that such skins are from Cape fur seals which:

(A) Were taken in a manner determined by the Director to be humane;

(B) Were taken from an annual harvest which did not exceed 70,000 Cape fur seals;

(C) Were taken on or after August 1, for any given annual harvest and were not of black pelage;

(D) Were not taken in violation of the law of the Republic of South Africa; and

(E) Were not taken from within the territory known as Namibia.

(2) For finished skins previously imported under a permit. No permit is required for skins previously imported under permit. However, markings on the skins consistent with the requirements of the permit under which the skins were previously imported, are required for importation.

(f) *Importation permits.* (1) The Director may issue permits authorizing the importation of skins of Cape fur seals. Any person desiring to obtain such a permit may make application to the Director. The sufficiency of the application shall be determined by the Director and, in that connection, he may waive any requirement for information deemed necessary. Any application for a permit, where applicable, will include:

(i) Name and address of applicant;

(ii) Month and year of taking;

(iii) Purpose of importation;

(iv) Quantity to be imported;

(v) Proposed date of importation;

(vi) Proposed place of importation;

(vii) Method of shipment;

(viii) Evidence of a commitment from the Republic of South Africa or a concessionaire that the applicant will obtain the number of skins stated in the application;

(ix) A copy of the certification required by subsection (e)(1)(ii);

(x) The following certification:

> I hereby certify that the foregoing information is complete, true and correct to the best of my knowledge and belief. I understand that this information is submitted for the purpose of obtaining the benefit of a permit under the Marine Mammal Protection Act of 1972 (18 U.S.C. 1361-1407) and regulations promulgated thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or to penalties under the Marine Mammal Protection Act of 1972; and

(xi) Signature of the applicant.

(2) Permits applied for under this section shall be issued, suspended, modified, or revoked pursuant to § 216.33.

(3) Permits applied for under this section shall contain terms and conditions as the Director may deem appropriate, including:

(i) The number of skins which are authorized to be imported;

(ii) The location from which they may be imported;

(iii) The period during which the permit is valid;

(iv) Any requirements for reports or rights of inspection with respect to activities carried out pursuant to the permit;

(v) The transferability or assignability of the permit;

(vi) The sale or other disposition of the skins;

(vii) A reasonable fee covering the costs of issuance of such permit, including an appropriate apportionment

of overhead and administrative expenses of the Department of Commerce; and

(viii) A method for identifying and tracing skins that have been imported pursuant to a permit.

(4) Applications for permits must include payment of a fee of $100. The Director may charge the amount of this fee at any time he determines a different payment to be reasonable, and said change may be accomplished by publication in the FEDERAL REGISTER of the new payment required, without the necessity of amending these regulations.

(5) When the total number of skins authorized to be imported from a particular yearly harvest reaches 19,180 skins, no more permits will be issued for the importation of skins from that harvest.

RESPONDENTS' BRIEF IN THE COURT OF APPEALS (PAGES 27-31)

2. *The Department of Commerce regulation defining "nursing" as "obligate nursing" has no basis in the MMPA but instead contravenes the statute.*

The Director of the NMFS, in reaching his decision, took the position that the term "nursing" in section 102 of the MMPA means only "obligate nursing" and that such "obligate nursing" in the Cape fur seal had ceased at least prior to August 1. The Director relied on a regulation promulgated by the NMFS on April 18, 1975, which defines "nursing" under the MMPA as "nursing which is obligatory for the physical health and survival of the nursing animal." 40 *Fed Reg.* 17845 (April 23, 1975). Nothing in the statute and nothing in its legislative history suggests that such a distinction be drawn in giving effect to the "nursing" prohibition.

After the Department published its proposed regulation on nursing, the Marine Mammal Commission objected in a letter dated April 9, 1975, stating that the distinction between obligate and convenience nursing is an "empty one", and that the Commission knew of "no rational scientific basis for concluding that nursing in fact is not obligatory for the health and development of the nursing animal in a sense that such behavior is essential for maturing and reproducing successfully." 40 *Fed. Reg.* 17846 (April 23, 1975). An explanation as to why the Commerce Department had failed to follow the Commission's recommendations would have required a response to the criticism that the regulation had no scientific basis. But the Commerce Department presented no scientific evidence whatsoever to support its new distinction. Instead, it merely stated that its new regulation reflected "Congressional guidance to date"—even though there is no reference in the Congressional debate or the legislative history to support the regulation.

In the opinion of the Marine Mammal Commission, the expert body established by Congress in the MMPA, there is no basis whatever for the notion of "obligate nursing." In its post-hearing brief (pages 14-15), the Commission said:

> "The concepts of obligate and convenience nursing are, like mean date of birth, constructs which are unsupported in the provisions or legislative history of the Act. As in the case of mean date of birth, the concept of obligate nursing is necessary in order to resolve a special problem faced by the applicant and is not necessary in order to remedy any fatal defect in the Act. Indeed, the arguments applied to mean date of birth apply equally well to the concept of obligate nursing.
>
> "The expert witness from South Africa testified that mother seals leave the rookeries in October and

> that all nursing has ceased for the vast majority of pups by September (Tr. 420, 428). The Act prohibits the importation of any animal that is nursing and does not distinguish between obligate and convenience nursing. An applicant seeking to import skins from animals taken in a harvest in September or October could be reasonably certain that none of those animals were, in fact, nursing and could thereby meet this burden under Section 104 of the Act. Contrived arguments that the applicant can import an animal which was killed because it did not *need* to nurse in order to survive but was only doing so as a *convenience* is irrelevant and inadequate for purposes of satisfying the categorical, unqualified statutory mandate of Section 102(b)(2) which makes it unlawful to import into the United States any marine mammal if such mammal was nursing at the time of taking."

It is instructive to note that the April 1975 regulation on which the Director relied was not based on scientific study by the NMFS, on analysis of the MMPA and the intent of Congress, or on any scientific precedent that distinguishes, for any purpose, between "obligate" and "non-obligate" nursing. The regulation was evidently contrived as a means to make possible the importation of seal skins from South Africa in the face of the statutory prohibition. It was apparently proposed and promulgated as a result of the report by a NMFS representative who visited South Africa and Namibia from September 17 to October 3, 1973. His report said:

> "*Nursing.* There is no doubt that this is the critical question regarding a waiver of the moratorium under the Marine Mammal Protection Act. During this trip, the stomachs of 20 seals were examined. The majority contained no food while one contained milk, indicating some seals were still nursing. The final resolution of the question would seem to depend upon either one of two actions:

"1. An amendment of the Act, or

"2. A legal determination that the Act refers to obligatory nursing only and a biological determination that obligatory nursing is completed by a predetermined date. Thus it would seem (unless our biologists and veterinarians can do so with present data and correspondence) that a further visit to South Africa is necessary. If so, such a visit could also detail further observations on humaneness.

"If a date of obligatory nursing is established (which falls during the harvesting season) South African officials felt confident that the government would adequately certify the dates of taking on each barrel of skins just as they can certify the place of origin (i.e., South or South West Africa) to ensure that no illegally taken animals are included." Administrative Hearing, Judge's Exhibit 6, page 28 (draft Environmental Impact Statement).

See also Judge's Exhibit 1, Appendix J, page 4 (1974 report of Dr. Wass):

"Many animals were observed to vomit milk. Their use for pelts would appear to be explicitly prohibited by the U.S. Marine Mammal Protection Act as it now reads."

Fouke has claimed that a letter written on October 26, 1973, by Congressman Dingell to counsel for Fouke serves to establish that Congress intended the term "nursing" to mean only "obligate nursing." Administrative Hearing, Applicant's Exhibit 2, page 7. This contention—which is the only argument advanced apart from the April 1975 regulation—has no merit. The letter from Representative Dingell in response to a communication from Fouke's counsel is not legislative history. It is a private communication from a single Congressman addressed to an interested party, written more than one year after passage of the MMPA and at the request of

the interested party. Congressman Dingell could not speak for Congress, nor did he purport to. The letter articulates no basis or reasoning to support the notion of "obligation nursing"; moreover, the letter acknowledges that the Committee was "not aware of the particular problem which now confronts you."

In summary, the distinction sought to be drawn by the Department of Commerce between "convenience" and "obligate" nursing is specious. It has no basis in the legislative history, it has been discredited by the Marine Mammal Commission, and it defies the plain language of the statute. Promulgation of the Department of Commerce regulation creating this distinction exceeded the scope of that Department's authority because the regulation modifies substantially the language of the statute it was empowered to administer. Therefore, the regulation was not validly promulgated and cannot stand. *Kent* v. *Dulles*, 357 U.S. 116, 128 (1958).